FEDERAL USURPATIONS

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All governments, whether free or not, which have existed and fallen have fallen by weight of political machinery. There has come a time in their histories when government and its machinery was the first consideration, and man and his individuality—the support of government—the second. It is well always to keep in mind the primal fact that while government is necessary and ought to be made good, it is yet, after all, a necessary evil growing out of the vices of human nature. It is a means to an end, which end is the happiness and freedom and development of the individual man and woman; and is never an end in itself.

This idea was carried further in the formation of our federal government than in that of any other government. In a certain sense indeed the federal government is not the government of these United States at all, but is a piece of central machinery organized to hold together in union the several governments of the several United States and protect them by union from mutual aggression and from aggression by foreign powers. Federal usurpation of power is not a recent growth. It was a necessary concomitant of the rule of the old federalists. Hamilton and men of his way of thinking, delegates to the constitutional convention, strained every effort to procure a stronger, or as they would have said, a more stable government than that which was as a matter of fact reported to the people for adoption in the original constitution. Though defeated in the convention in many of their essential purposes it was but natural that when the constitution was submitted to the peoples of the respective states, that they should have become the most strenuous advocates of its adoption, because though giving birth to a government not so strong nor so centralized as they desired, it still inaugurated one very much more to their liking than the old confederation. They soon found that the objections to its adoption were not based on its being too weak a bond of union, but were precisely the contrary. They therefore neces-

sarily based their advocacy upon the plea that it did not interfere with the real rights and sovereignty of the states, within their spheres; that the states would still have such rights as were not delegated expressly or by proper implication, and in their advocacy they emphasized how little authority and power, comparatively, the new federal government would have. Notwithstanding this fact, the discontent with the constitution as it came from the hands of its framers was so great, upon the ground that it did not sufficiently safeguard the inalienable or natural rights of the individual and the reserved rights of the states, that it was adopted only upon the understanding that the first ten amendments should be added to it. They were immediately added after the adoption of the original instrument.

If you will dispassionately take up our fundamental law and study it without the first ten amendments, you will see that it would have launched into existence the least democratic of all governments now existing amongst English-speaking peoples. As originally framed, there was no express guarantee of the freedom of the press, freedom of speech, freedom of assembly, trial by jury or habeas corpus—in fact, most of the muniments that had been secured by war and legislation to the race before it crossed the Atlantic were unprotected, whether these muniments had been embodied in the habeas corpus act, in the bill of rights, or in some other instrument.

George Washington was not really a member of any political party. He had the idea that government with free institutions could be carried on without parties, and deplored their existence as factional. At the beginning of his administration this idea was his guide. Later on, after Jefferson had retired from the cabinet, and Hamilton became unrestrained adviser, the administration did take on a somewhat federalistic hue. When John Adams came in, with the real federalists in supreme power and full control, then the note of federalism in the shape of federal usurpation of power began to assert itself. The great usurpation of federal authority in the alien and sedition laws was an illustration of the legislative and executive side of the government. When Adams was retired, he left the bench in control of federalist judges, the greatest, most ingenious, as well as perhaps the most sincere of them all being John Marshall. The Dartmouth College case, in my opinion the

Illiad of all our woes, in so far as our inability properly to control corporations is concerned, and in so far as judicial construction has brought about federal usurpation, naturally followed. The decision giving the right to the federal government to establish and maintain a national bank, for which no authority could be found in the organic instrument, except by fiction of law, was another result of a federal judge's attempting to construe into it something sought in the convention to be embodied and the granting of which had been refused.

Every governmental abuse is based upon some plea or pretext, and the usurpation of power by government is generally based upon "necessity," the "tyrant's plea." This real or fancied necessity generally grows out of war. This has been especially true with regard to legislative and executive usurpations by our federal government.

Amidst the universal plaudits which he has received and deserved there are few people left ungracious enough to give sufficient emphasis to the part which Abraham Lincoln and his cabinet had in changing the spirit, if not the form, of the American government. The doctrine of "war powers" came into being, and after war had passed and peace had come the usurpations following from the exercise of the so-called war powers furnished precedents for their continuance and for other usurpations like them. It has always been said *inter arma leges silent,* there are undoubtedly certain powers which have been recognized to belong to all governments while forces are operating in the field and in the enemy's country beyond those which are conceded to the same governments at peace and at home.

During the war between the states the executive first asserted and Congress afterwards attempted to confer upon the executive the right to suspend the privilege of the writ of habeas corpus not only in the territory which was within the boundaries of the confederacy, but within the states which had remained faithful to the Union, and which did not constitute a field of war. Things went so far that the privilege of the writ of habeas corpus was suspended on the order of a lieutenant-general acting under general authority of the President. This in spite of the words of the constitution upon the subject and the uniform dicta of text books and decisions of courts.

The Secretary of War and the Secretary of State on bare orders based upon no affidavit even, much less indictment, arrested and confined men within the loyal states and spirited them off to prison. Federal marshals and police did the same thing. All this, too, prior to the act of March 3, 1863, whereby Congress attempted to confer upon the President the power and the right to suspend the writ of habeas corpus, a power vested by the constitution according to all judicial construction in Congress alone.

Men were convicted of murder and treason without a jury trial. Under a proclamation of the President amongst the classes to be thus treated were those who "magnified the resources of the enemy," those "inflaming party spirit among ourselves." It seems almost incredible now to believe that men could have been taken out of their beds at night and carried away to prison, without even affidavits, by ignorant marshals who determined for themselves the question whether or not those seized and imprisoned were guilty of disloyalty, especially when disloyalty was defined in such vague terms as "magnifying the resources of the enemy," "underrating our own," or "inflaming party spirit amongst ourselves."

In December, 1866, in the case of ex parte Milligan,[1] the Supreme Court pronounced the proclamations of the President unconstitutional and the act of Congress so, except when "confined to the locality of actual war," and not elsewhere, and to places "where the courts are not open."

There are those who believe that the branch of the government most guilty in the field of federal usurpation is the judiciary. This is not true. Upon the whole the courts have been a bulwark of protection for the natural rights of the individual and the reserved rights of the states. Judicial usurpations, which have been successfully accomplished have not been a tithe of those which have been unsuccessfully attempted by the federal legislature and the federal executive. The Ku Klux act which would have carried the federal authority into every man's home within the states in the enforcement of criminal law, the civil rights act, which usurped to the general government nearly all of the police powers of a state, and the control of the social affairs of the citizen, are illustrations of attempted federal usurpations set aside by the court.

During the period immediately after the war between the states

[1] 4 Wallace, 2.

Congress fought most viciously against the courts, frequently taking away from them jurisdiction on the subject matter, or attempting by acts of Congress, and sometimes successfully to prevent appeals to the Supreme Court of the United States. A book might be written, and a very interesting one too, upon usurpations flowing out of the Civil War and out of the supposed "necessities" of a reconstruction of the Southern States. Some of the usurpations that owe their real existence to the Civil War still remain to plague us, for example, the legal tender case. The constitution deprived the states of the power to emit letters of credit and issue paper currency, a power which was inherent in their sovereignty, but which had been found to be greatly abused. Hamilton himself contended that not only was this power not granted to the federal government, but that in spirit it was prohibited to it. Nobody ever did or does now doubt the right of the government to issue a note as evidence of indebtedness when it has not the money wherewith to pay. But nobody up to the Civil War had ever, for one moment, dreamed that the government had a right to levy a forced loan upon the people by making its notes a legal tender for the payment of debt. This legacy is not justly attributable to the judiciary, but to the President and the Senate.

You are familiar with the manner in which this result was arrived at. After a first decision by the court declaring the legal tender act unconstitutional, the addition of a new judge to the number on the bench and the appointment of another judge to fill a vacancy on the old bench caused by death accomplished a reversal. It requires no imagination, but a plain view of the field only, to realize what an immense capitalistic and centralizing influence the judicial construction into the constitution of this power which was never granted, to wit, the power to make of government notes a legal tender to take the place of gold and silver has vested in the federal government.

John Marshall in the case of McCullough against Maryland had early in the history of the country upheld the power of the federal government to charter a national bank of issue, although a proposition in the constitutional convention to confer such power had been expressly offered and expressly voted down. The opinion in the case upheld the bank as a "fiscal agency" of the government, and as such it was declared that it could not be taxed by a

state, because such power of taxation would carry with it to one sovereignty the power to destroy the fiscal agencies of another. And yet long afterwards when the law to establish the present national banking system in order to strengthen the credit of the government and increase the price of its bonds, carried a provision to tax note issues by state banks 10 per cent (it being admitted that this tax was levied not for the purpose of revenue, but for the purpose of stamping state bank issues out of existence), the court cavalierly flung aside the doctrine that one sovereignty could not tax out of existence the chartered instrumentalities of another, and held, in substance, when it sustained the constitutionality of the 10 per cent tax, that it could. The power to issue "money" directly in the shape of legal tender treasury notes, the power to confine the function of bank note issuance to national banks and to monopolize their regulation have together given to the federal government that power and influence over finance and business which makes other usurpations, whenever all three branches of the federal government are desirous of them, irresistible by the states or by the people thereof.

The early assertion by Congress of the power to levy import duties not simply as taxes for raising revenue, but for the admitted purpose of hothousing into prosperity at the common expense such industries as in the opinion of Congress it is for the common interest and general welfare to hothouse, has given a whip handle, if not a mastery, over the manufacturing interests of the country to the federal government. The usurped control of finance and of manufactures, together with the immense powers actually vested by the constitution itself in the federal government, under the treaty clause and under the interstate commerce clause, have made a government stronger than any that Hamilton and his compeers ever dared attempt to inaugurate in the constitutional convention—stronger than any that Marshall ever dreamed of construing, or wanted to construe, into existence.

This is true when you consider the real power of Congress under the interstate commerce clause, when it is exercised honestly and genuinely for the sole constitutional purpose of the regulation of interstate commerce. When you consider that this power has been abused as a means to accomplish ends not contemplated by it, this conclusion is stronger. Consider the full effect of the lottery

cases and the oleomargarine cases carried out to their logical results as precedents for future legislation and judicial decisions.

What has been actually accomplished by legislation regulating, or pretending to regulate, interstate commerce, is as nothing compared with what is proposed. A brilliant young Senator from Indiana proposes to control child labor within the state through the interstate commerce clause by denying to products manufactured within a state interstate passage, when produced by child labor, though employed in accordance with the laws of the state of their manufacture. If Congress has power to do this it has power also to say that no products shall be carried in interstate commerce, if produced where labor is employed for longer than eight hours a day. If it has a right to do either, it has a right to say that no man or woman shall travel upon an interstate ticket who has been divorced according to state divorce laws which do not meet with the approbation of Congress.

Early in the history of the country the House of Representatives sent to the Senate a bill to regulate and work certain copper mines in New Jersey—I believe it was, if my recollection is correct—and Mr. Jefferson, in his playful but philosophical manner, said that their method of deriving this power from the constitution was about this: "Congress has a right to provide for the common defense; ships are necessary for the common defense; copper is necessary to finish ships; mines are necessary to be worked in order to get copper, and, therefore, Congress has a right to work mines within the states," and he added that anybody who had ever followed the reasoning in "The House that Jack Built" could readily understand and be convinced by the force of the argument.

We are told now that water is necessary for interstate commerce; that erosion of hillsides and mountains fills up the water courses; that deforestation leads to erosion; that reforestation will stop erosion, and that, therefore, under the interstate commerce clause, Congress has a right to enter into the states, with or without their consent, buy up all the mountain sides, and turn them into public forests, an argument probably logical, but very attenuated.

By parity of reasoning Congress might enact a force bill under the interstate commerce clause basing it upon the right of Congress to say what should or should not enter into interstate commerce as freight or as passengers. It might, therefore, say that any man

elected to Congress, unless elected in accordance with a certain law passed by Congress, should not be permitted to travel in interstate commerce, and therefore should not be permitted to leave his state and come to Washington to take his seat as a representative. I know, of course, that the *reductio ad absurdum* is not the safest of argument, but it sometimes makes things ridiculously clear.

Add to all this power over finance, banking, commerce, manufacture, the immense spread of the activities of the Department of Agriculture. It is furnishing seed to the farmers, it has established a stock farm in one of the states for the purpose of breeding "a standard national horse," and the right of entering into a state, with or without its consent, and constructing roads not only between the states but within the states is being almost asserted. With construction will come the assertion of the right to control, if not to police such roads.

The undoubted right of Congress so to regulate interstate commerce as to stop the spread of disease amongst men, animals or plants is being driven to its utmost, and will be driven beyond its utmost, legitimate application. That the operations of the great Department of Agriculture are beneficent there can be no doubt. The few millions appropriated each year for that department accomplish more good than ten times as many millions appropriated for other purposes. But it does not follow that because a given work is wise and beneficent that the federal government has the right, or ought even by amendment to be given the right to do it, nor does it follow that because the federal government does beneficently carry it on that it could not have been carried on quite as beneficently by the states, if the federal government had stayed out of the business. In connection with agriculture, for example, I, for one, believe that if the federal government had never undertaken to do anything at all with it the general condition of agriculture in the country would yet have been quite as good as it is, perhaps better, because then the states would have established magnificent agricultural departments with experimental stations, training schools and all that; would have vied with one another from New York to California in doing the work, each actuated by the motive of excelling others in the prosperity brought by improving the basic art. The department wants the federal government to go further and to inaugurate and maintain in the state technical, agricultural

and manual training schools, with what measure of federal control it has not thus far seen fit to indicate.

Take as the next illustration the gradual assumption of power to the federal government in connection with works of irrigation. That Congress has a right to irrigate the public lands so as to make them valuable, and enable them to be sold so that the money thus placed in the treasury as the proceeds of otherwise worthless lands may inure to the interests of all the people, there can be no doubt. Growing out of this right Congress has taken hold of the work of irrigation everywhere on private lands as well as on public domain. It has added to that the kindred subject of drainage, because undoubtedly if Congress has power to put water on lands outside of the public domain it has an equal power to take water off of lands outside of the public domain. The departmental work does not seem to have received even a momentary check from the decision of the Supreme Court in the great case of Kansas against Colorado, in 206 U. S., where the court says that "no one of them" (to wit, the enumerated grants of power and authority to Congress in the constitution) "by implication refers to reclamation of arid lands."

In some cases where Congress has usurped power and where the courts have subsequently set aside the acts of Congress as unconstitutional the wrongs perpetrated under the act have been perpetuated. The Captured and Abandoned Property Act is an instance in point. After the general amnesty proclamation of the President it became evident that the money lying in the treasury from the sale of captured and abandoned property would have to be restored to the Southern people who had owned it. A rider on an appropriation bill of July 12, 1870, undertook to annul, and Congress, by refusing to appropriate the money out of the treasury practically has annulled the subsequent decisions of the court upon this subject. Millions of dollars are now lying in the treasury accumulated there under this act of Congress which the court subsequently held to be a special fund owned by the owners of the property. There is no way of getting it out however, because, as the court properly says, it requires an act of Congress to appropriate money once covered into the treasury. Here is a case where federal legislation has been adjudged invalid and unconstitutional, and yet where the people injured by the usurpation have

suffered the effect of it, until they died, and their heirs or assigns are suffering the deprivation yet. The money in the treasury derived from the cotton tax and still kept there is another instance in point.

I have referred to the war between the states as a source of much federal usurpation. The Spanish-American War might be referred to in the same connection. The Constitution of the United States provides for the separation of the judicial, executive and legislative functions. In the Panama zone, the executive alone has been and is exercising not only executive but judicial and legislative functions. When a resolution was introduced into Congress, and passed by it, asking under what authority of law the President was doing this, the answer came that it was under authority of certain acts of Congress, their dates being recited, and under a treaty with the so-called Republic of Panama, as if either an act of Congress or a treaty could confer upon the executive the right to exercise judicial or legislative powers, in the teeth of an express constitutional prohibition of their consolidation.

Our experiments with schemes of crown colonialism in the Philippines now, and for a while in Porto Rico, were so stupendously alien to the spirit of all of our institutions as to be at once horrible and amusing. Department law clerks sent out as proconsuls are learning in the Philippines and in Cuba to-day lessons which will return to plague the republic at home. You need not expect that what is learned there will be forgotten here. In Rome the Imperator was first a field officer in Gaul or Asia—in the enemy's country or in conquered countries. Then there came the exercise of powers as Imperator in Rome itself. Marius and Sulla, as well as Julius Cæsar, were virtually emperors long before Augustus Cæsar had founded what we now call the Roman Empire.

Peace is important to all peoples. I sometimes think that two-thirds of the energies of all the statesmanship in the world might be profitably employed in the maintenance of peace throughout the world. But, if important to other peoples, it is doubly so to us with our peculiar dual government, the balance of which is so nicely adjusted and so vital, and which is always shaken by the *sequelæ* of war. We never know beforehand what these *sequelæ* are going to be. You hear much of "the horrors of war." The greatest of all these horrors is the murder of local self-government, the only possible field of development for individual manhood.

The spirit of crown colonialism will be found to be contagious. Accustomed to it in all its spirit in our daily administration of colonial affairs, the public will gradually become accustomed to the insidious introduction of its features at home. No free government can successfully control alien and unassimilable peoples except by the violation of the fundamental principles of free government itself. Our forefathers recognized this when they placed the Indian tribes on a footing with foreigners, to be dealt with by treaty. The mailed fist, well exercised to its task, is dangerous ultimately to liberty of citizens much more than it is even to subject peoples. The system will some day drag down England herself to the exhaustion of her sons and her revenues in maintaining her hold upon India. The inauguration of the system by us in the Philippine Islands, unless once we have the good sense to put the people of the archipelago upon their own feet, teach them to stand alone and leave then standing afterwards, will have the same effect on us in the long run. The Philippines are even now furnishing the excuse of great armaments, naval and military, and they constitute to-day the one point of unnecessary and unnatural contact out of which great wars may, if not must, ensue.

These federal usurpations are going on not only through the executive, and the legislative, but—insidiously, gradually, unmarked,—they are going on through the administrative branches of the government. Charles I lost his head, and James II his throne, because of executive and administrative suspensions of acts of Parliament. The American people have become so accustomed to the suspension of laws by mere non-enforcement by the executive, or some obscure bureaucrat under the executive, that you perhaps could not excite real alarm in the minds of five men by a full recital of them all.

Mr. Shaw, while Secretary of the Treasury, took money already covered into the treasury, and under the guise of depositing it virtually loaned it to such banks as he chose without interest. This, notwithstanding article I, section 9, clause 7, of the constitution, which reads: "No money shall be drawn from the treasury, but in consequence of appropriations made by law." The same Secretary of the Treasury quietly construed the disjunctive "or" in a law passed by the Congress to have the meaning of the conjunctive "and," so that when Congress had by law said that

those receiving deposits of public money—not deposits of money already covered into the treasury, remember—but deposits of money collected from internal revenue and not yet covered into the treasury—should deposit as security United States bonds "and" other bonds, that it means "or" other bonds. Upon this he quietly issued a ukase to the effect that he would receive such securities as complied with the savings banks laws of New York and Massachusetts, and would dispense with the deposit of United States bonds altogether in his discretion.

The discussions in Congress at the time that the law under whose alleged authority he acted was passed show the reasons for the original act. People forget now that there was a time when United States bonds were not at par. It was wise, therefore, upon the part of Congress to provide that the Secretary might require other security as *additional* to that of national bonds in order that the security might always be equal in par value to the money loaned. I need not dwell upon the total torturing of the original meaning by the Secretary's decision. Secretary Cortelyou ruled later on that under the provisions of a law permitting the issuance of treasury certificates "when necessary to meet public expenditures," he was enabled to issue certificates to get money in order to help the banks by free loans in a panic.

An administrative board of the United States, engaged in the business apparently of seeing that due "protection" is rendered to "American industries," and finding that there was no tariff on frog legs which were being imported into our territory, to the detriment of the great "American industry" of bullfrog raising, gravely ruled that they were taxable under the provision which put an import duty upon dressed poultry.

What has been accomplished in the way of federal usurpation by the national legislature and executive, and set aside by judicial authority, or left to stand and stay to plague us yet, does not constitute a tithe of what we are to expect, if some recent utterances by great and popular men are to be taken at their face value.

The President, in his Harrisburg speech, delivered in the month of October, 1906, says: "In some cases this governmental action must be exercised by the states. In others it has become increasingly evident that no sufficient state action is possible and that we *need* through *executive action,* through legislation and through

judicial interpretation and construction, to *increase* the power of the federal government. If we fail *thus to increase it* we show our impotency."

Mark the language. "We need"—that is the old familiar tyrant's plea of necessity—to do what? To increase the power of the federal government. The very verb "increase" is the President's word, and is a confession that the federal government does not now possess the powers desired to be annexed—a confession of deliberately contemplated usurpation. And to do it how? Not by amending the constitution, even though we had to amend the amendatory clause in order to make the work of amendment easier. But by "executive action," by "legislation," both of them necessarily, if there be an *increase* of power, violative of the constitutional limitations upon executive action, and upon federal legislation. It cannot be too often repeated that this is true, or else the word "increase" would not have needed to be used. And third, and more insidiously still, "through judicial interpretation and construction"—by the soul of all insidious revolution! Mark the words well in your memories.

Secretary Root, in his New York speech in December, 1906, evidently following up a deliberately laid scheme by supplementing the President's speech in Harrisburg in October of that year, uses this language: "Sooner or later constructions *will be found* to *vest* power where it will be exercised in the national government." Secretary Root is a lawyer. He knows what the verb "vest "means. Vest means to give, to deposit a new power, not merely to apply an existing one to new conditions. His language is, to "vest power." His ground and excuse and reason for "vesting" it is that it must be "placed"—placed, mark you—where it will be exercised. The necessary inference is that it is now vested in the states, and that they ought to be divested of it, because they do not exercise it. His method of vesting power again is like the President's—not by amendment to the constitution, whereby the people themselves can redistribute the powers which are theirs and which they originally distributed between our dual sovereignties, but "by constructions" which are to be "found." Found by whom? By the very men who are to exercise the power construed into being or "found."

An American citizen does not take an oath of allegiance to

any government. His oath of allegiance is to the constitution. Every officer who serves the federal government, from the President down, whether he be cabinet officer, judge, senator or representative, takes this oath. It is now proposed that the officers of the federal government shall vest power in themselves by construction and that they shall increase their power through executive action. Think of it! And yet in all the land no hint or suggestion of impeachment.

This method of amending the constitution does not require a two-thirds majority in each house, nor three-fourths of the states in confirmation of it. It is easy. It requires nothing but momentary forgetfulness of an oath registered in the chancel of God. It is not a personally dangerous thing to attempt or to do. It may perhaps even be applauded.

What is more, the President proposes to "make good"—a phrase he is fond of. I have no time to refer to all the circumstantial evidence, but run over in your minds our recent history: Root's part in it in the Philippines; the acts of our proconsular agent in Cuba, this proconsular agent having been a law clerk in Washington; the present condition of things in the canal zone, and the frequent chidings by the President of the courts where they do not decide to suit him, showing a purpose of bending and warping the personnel of the supreme and other federal courts to an incorporation of his policies by judicial construction as a part of the authority of the federal government. No lawyer not entertaining an opinion favorable to these policies can go upon the bench unless he succeeds in fooling the President, or unless the President fools himself, as to such lawyer's legal opinions. Daniel Webster was right when he said that: "the judicial power cannot stand for a long time against the executive power." The President has already during his tenure of office appointed one-third of the Supreme Court and over one-half of the subordinate federal judges.

Judges on the district and circuit bench, although they hold their offices during good behavior, feel ambition like other men and would like to fill vacancies upon the supreme bench as they arise. They can furnish no course better calculated to bring about that result than to let it be known by their decisions as subordinate judges that they share the President's opinions, and among others, perhaps chiefly, his opinion of the rightfulness of "increasing" federal power "by construction."

The difficulty of amending the constitution is the excuse at heart for most federal usurpations, this with, and even more than, the alleged "inaction of the states." It was well that at the beginning the practice of amendment should have been made extremely difficult. The important thing was to put the government upon its feet and teach it to march, as the French say; to stop experiments with the framework until the people had become accustomed to it. We have reached the point now where there are many amendments that ought to be made to the organic law, first, because they are highly beneficent in themselves; secondly, because we want to do away with this excuse and pretext of usurping power in order "to do good." It has been said that the federal constitution cannot be amended except as the result of some great cataclysm, or foreign or civil war. This is a mistaken statement, but it is true that it is very difficult indeed, to amend it, so difficult as to be, under ordinary circumstances, almost impossible. If you have a system which is too difficult of legitimate change you thereby invite illegitimate change or usurpation.

The first clause in the constitution that ought to be amended is the amendatory clause itself. The practice of amending the constitution ought to be a difficult one, but not so difficult as it is now. It would seem that to require a majority of ten per cent, over one-half in each house, voting for two Congresses in succession to submit an amendment, would be a requirement sufficiently difficult in the initiative. This would require at present 51 senators and 215 congressmen, and as that vote would be required in two successive Congresses, the scheme would give the people an opportunity to pass upon the proposed amendments tentatively when they came to elect the first Congress after the proposal of the amendment. If to this it were added that the proposed amendments should not become a part of the fundamental law unless they had been adopted both by a majority of the people and by a majority of the states, the practice of amendment would not be rendered so easy as to lead to many propositions of amendment, and still would be made easy enough to encourage a hope upon the part of those who wish to preserve our institutions that they would not be destroyed by the very organic difficulty of changing them.

It is not, however,—note ye well,—in this way that either President or Secretary proposes to go about the introduction of

reforms, or a redistribution of governmental powers. It is not proposed that it shall be done deliberately by amendment upon the initiative of the national legislature and upon the confirmation of the people in the states, but that powers are to be "vested" in the federal government and that federal powers are to be "increased" by "constructions" which are "to be found" or "by executive action" and "by legislative action" and by a judicial reading into the instrument of that which is confessed by the very language used not to have been written into it. There has been a recrudescence of federalism here lately, alarming in its proportions. We begin to hear a great deal once more about "inherent powers" "powers ordinarily exercised by sovereign nations," and therefore as is claimed to be exercised by the federal government. The President talks about court decisions which have left "vacancies," "blanks" between federal and state powers, and wants these vacancies and blanks filled, occupied, "by executive action," "by legislative action" and "by judicial construction." No decision of any court could possibly have ever left a blank or a vacancy between the powers to be exercised by the federal government and the powers to be exercised by the states. The moment the court decides that a given power is not one of those granted to the federal government, either expressly or by proper and honest implication, that moment the court has decided *e converso* that it *is* a power reserved in the states by virtue of the eleventh amendment, is in other words one of the powers not delegated but reserved to the states "or to the people." What can be of more "national concernment" than murder, theft, insanity? Yet no one would contend that the federal government was granted the power to legislate to punish them within the states.

Much has been written about what is meant by the phrase "or to the people." In my mind it is clear—the powers not delegated are reserved either to the states or "to the people" *for redistribution* as they may choose by amendment of the constitution. Both state and federal governments are their servants, not their masters. The people of the United States, acting within their respective states, have the right of distribution of governmental power. Again, individuals also have certain natural and inalienable rights, to which reference is likewise made in the phrase—these are by nature reserved to the people as rights not to be touched by state or by

federal government—by any governmental or political agency whatsoever. That man does not understand the nature of American institutions who thinks that arbitrary and unlimited power is vested anywhere under our system, even in a majority of the people themselves acting through any government or by themselves. There are things which under our system a majority cannot do, whether they are in their opinion right to be done or not. Thus high was the sacredness of individuality held by our forefathers.

I was talking a moment ago about the influence of the executive over the judiciary. I quoted Daniel Webster to the effect that the judiciary could not stand long against the influence of the executive, and yet the spirit of the times is such that it has been gravely proposed in a bill introduced in the House to make this influence still greater. That bill, introduced on January 4, 1907, provides that the President "whenever in his judgment the public welfare will be promoted by the retirement of a judge" may retire him, "with the advice and consent of the Senate," and appoint somebody else, who shall take his place. This would give to the President and the Senate of the United States absolute control over the judiciary.

Our executive department has carried the Root doctrine into its dealings with Congress. Where Congress will not enact legislation that the executive wants, some administrative department construes it to exist, as was the case in the graded age pension ukase issued by the commissioner of pensions. A bill had been pending in Congress to accomplish the precise result. Congress would not pass it. The executive, through the commissioner of pensions, amid popular applause, construed it into existence.

When, later, it was proposed upon a general appropriation bill to insert a clause enacting into law the graded pension system thus promulgated, the point of order was raised that the motion could not be entertained by the House when a general appropriation bill was under consideration, because it was "contrary to existing law." In other words, that the amendment containing the very language of the ruling of the commissioner of pensions was a change of existing law. This point of order was sustained. Sustaining it was an admission of the fact that the executive order had promulgated a new law—that a branch of the executive had legislated. If, on the contrary, the point of order had not been sustained, then the very fact of the adoption of the amendment

would have been a confession of the fact that Congress needed to act in order to make good that which by executive order had been promulgated.

A treaty with Santo Domingo was pending before the Senate of the United States, which the Senate for a long time refused to confirm. The executive, being determined to have its own way, Senate or no Senate, did, as a historical fact, for two years before the ratification of the treaty by the Senate, execute the terms of the treaty.

The President at one time had a nomination of a certain South Carolina negro named Crum pending in the Senate, and the session came to an end without action on it. Thereupon an extraordinary session having been called to begin at 12 o'clock on the very day upon which the former session expired, Secretary Root and the President, between them, construed into existence what they called "a constructive recess." That is, that between the beginning of 12 o'clock meridian and the end of the same 12 o'clock meridian on a given day "there had been a recess," and this being the case the President had a right to reappoint this proposed appointee during this so-called recess. He *did* reappoint him thus contrary to law and the Senate was subsequently coerced or persuaded to confirm him.

The logical inconsistency of public opinion in America was never better shown than with regard to this incident. The President's construction into existence of a constructive recess for the purpose of saving his right of appointment aroused no indignation, although it was the act of one man. He had, however, set a precedent which soon found imitators. If there had been a recess, then members of Congress were entitled to mileage for the recess rather for the new session following it. They, therefore, very logically, according to the precedent set by the executive (although, of course, very wrongfully, but no more wrongfully than the President) and voted themselves mileage for the "recess." A storm of disapprobation from the throats of the people and the columns of the newspapers swelled to heaven. The Senate voted the extra mileage out and President, people and all "congratulated the country." The man who imagined the iniquitous thing and acted upon it secured the result that he aimed at and was little, if at all, criticised. The very Senate that voted extra mileage out of the law upon the ground

that there had been no constructive recess, finally confirmed the appointee whom the President had hurled back at them upon the theory that there had been a constructive recess.

Franklin Pierce, in a recent book that ought to be taught in every school and college where civil government is taught, a book entitled "Federal Usurpation," from which I have drawn much for this speech, says: "Social evolution progresses actually with the importance of the citizen over the state and decreases in the proportion of the importance of the state over the people." All these propositions of adding to the powers of government by "executive action" and "legislative action" and "judicial construction" and "constructions to be found" leave that great truth out of sight. I know of no people who have too little government. We do not want an America like Sparta, where the state was all and man was nothing. We want no Rome even, where responsibility was so entirely devolved upon government that when government itself grew weak there was no initiative left among the people even to resist invasion,—a herd of helpless sheep, they were.

Our weight of political machinery is increasing all the time. Not many years ago there were about two hundred special agents and detectives in the employ of the government. There are over three thousand now, going around hunting up by detective methods violations of federal statutes. A detective is like an expert in the medical profession. He generally finds what he is seeking. God never made a throat or nose to suit a throat and nose expert; he never made a pair of eyes to suit an eye specialist. The Department of Justice uses a great many of these detectives. When you begin to inquire under what authority of law, it is difficult to procure an answer. That department seems to borrow them from the Treasury Department. In other words, they are detailed from the Treasury Department to do work for the Department of Justice. The law appropriating for them in the Treasury Department appropriates for them for the expressed and sole purposes of ferreting out and procuring punishment of counterfeiters and violators of the internal revenue laws. They are being used for a hundred other purposes—peonage is the immediate fad—public land stealing was a few months back. In so far as special agents are being used for the purpose of investigating trusts and bringing them to book, there is authority of law independently.

Judge George Gray well says in a recent speech that: "In Rome when a dictator was appointed, his instructions were 'to take care that the state receive no harm.'" This was a pretty broad authority. Mr. Bryce, the author of "The American Commonwealth," seems to think from what he says that our Presidents in times of acute peril may or must, act on a like instruction. The present President does not seem to think that it is necessary to wait for a time of acute peril, but that the instruction is good "for any old time."

When the New York Constitutional Convention adopted the Constitution of the United States, it adopted it with the proviso that there should be no extension of power "by legal fiction." This was to prevent usurpation of federal power by construction. How far the power of legal fiction may carry a system of laws may be realized when it is remembered that from the twelve tables of ancient Rome there grew up by construction and legal fiction the *corpus juris civilis,* and from a lot of old customs there grew up by court precedents nearly all of the body of what we call our "common law."

The only restraint that we have upon executive usurpation is either judicial constraint or impeachment, and the only restraint that we have upon judicial usurpation by construction is the power of impeachment by the House of Representatives before the Senate acting as a grand court of impeachment. It requires two-thirds of the Senators to convict and the sole penalty is deprivation of office. The process is surely difficult enough at best and the penalty light enough. The Swain case, however, shows to what extent we have gone in limiting that power. Federal judges are chosen, to use the words of the constitution, "during good behavior." It would seem that their independence is sufficiently protected by this tenure and the difficulty of obtaining a verdict of removal by two-thirds of the Senate. But if we are to learn any lessons from the Swain case at all, the phrase, "during good behavior," has been construed to mean "during life, except when the judge has violated the express provisions of a penal statute." The power of impeachment was given to protect the people from "high crimes." They are necessarily indefinable. What higher crime can there be than treason? What greater treason than treason to the constitution, our sole sovereign, to whom alone we swear allegiance? What greater treason

than the terrible attempt by a judge to destroy the integrity of the organic law by construction, with deliberate intent to make law or to increase federal power? Yet our President and his chief secretary encourage this very form of treason, insidious and horrible, and there neither is nor can be any penal statute against it.

Do not misunderstand me. There is a difference between these latest day propositions and the application of an undoubtedly granted power to a new condition. If the federal government had been granted expressly or by fair and honest implication power over a given subject matter, no change of phrase in that subject matter can balk the application of the power. The power over interstate commerce, for example, could not be limited because human invention had brought into existence steam railways as instrumentalities of commerce. But it remains true that in construing the organic law the duty of the judge lies in holding to the old maxim, *"Ita lex scripta."* Nor is it necessary to enter into the formerly mooted question as to whether this construction should be narrow or broad, strict or liberal. What we want is an honest and sincere construction of the real words and the real intent and the real purpose "nought extenuating nor setting down aught in malice." Otherwise construers of law become makers of law—judges become legislators.

I am one of those who believe that infinite damage has been done by the study and popularity of Hon. James Bryce's book, "The American Commonwealth." It is almost impossible for an Englishman to understand our system based upon the underlying theory of a written constitution. The Constitution of Great Britain is a thing of construction, or evolution, of growth by judicial construction,—growth by changing opinion. Parliament has unlimited power, subject to certain fundamental natural rights of the individual which, broadly stated, are "the inherited rights of free born Englishmen." Mr. Bryce, therefore, in dwelling with apparent pleasure upon the fact that the Constitution of the United States might be changed by judicial construction (changed now, mark you, not developed) was acting very naturally for one of his environment and training. He could not appreciate the horror in the mind of a real American,—really in love with the institutions of his own country,—for the very thing which he dwells upon with a tolerant, if not a favorable eye.

I shall not say much more, however, about judicial usurpation, because there has not been as much usurpation by that branch of the government, either attempted or consummated, as by the other two. Upon the whole, our judiciary has rather preserved the constitution from popular passion and impulses, from party spirit and sectional hate, and as Congress and the executive grow wilder, it sets aside from year to year a larger and larger proportion of their acts. During the entire period before the Civil War it had set aside only two or three general acts. Just how many multiples of that number have been declared unconstitutional since I cannot now say, but we have grown accustomed to the Supreme Court's checking up Congress and the President every now and then, and the prayer of every good American is that it may do so "more and more unto the perfect day."

Yet the judiciary has made some apparently queer decisions lately. In Mankichi's case, which came up from Hawaii, there had been no indictment nor any unanimous verdict of twelve men—in our constitutional sense a jury verdict—against the prisoner, and yet the Supreme Court affirmed the case upon the ground that the laws of Hawaii when annexed to the United States had not required an indictment and had made provision for a jury that did not find a verdict by unanimity. Upon what principle the court arrogated to itself the right to say just what fundamental constitutional principles should go with the constitution to Hawaii simultaneously with the annexation, and which of those fundamental notions should remain behind, to go later or not at all, presents a curious study.

The gradual growth of injunctions in federal courts constitutes the chief thing to complain of in connection with that branch of our government. Originally the equitable right of injunction was issued when the law remedy was inadequate or the damage irreparable and did not apply to crimes. In Lennon's case,[2] however, men were actually enjoined for refusing to haul cars of a railroad and for leaving the employ of a railroad, while under the charge of a receiver appointed by a federal court, on the ground that their quitting the employment "crippled the railroad's operation," and I believe, if I remember correctly, also upon the ground that it interfered with interstate commerce. This injunction was issued in

[2]166 U. S.

spite of the thirteenth amendment, which forbids "involuntary servitude except for crime."

If everything that can be construed to be an interference with interstate commerce is to be taken as a just ground for an injunction, a man who shoots another riding on a ticket from Philadelphia to New Orleans would, so far as I can see, subject himself to federal penalties instead of being simply tried for murder, according to the laws of the state of the place where he committed the murder. Even when United States penal statutes exist, where a man can be arrested upon affidavit and rendered harmless, the federal courts still issue injunctions.

The power to inflict punishment for indirect contempts,—constructive contempts,—contempts committed not in view of the court, punishments which carry deprivation of liberty and deprivation of property without a jury trial is another abuse. These things encourage a spirit of anarchy. Every man, if possible, ought to have a trial by jury. Injunctions are issued by one judge on *ex parte* hearing, on mere affidavits without notice even to the defendant and on reference of questions of fact to one referee. Upon such evidence as that and upon such findings of fact as that the enforcement of state laws, passed deliberately by state legislatures and approved by state executives, is enjoined. The plea generally is that the state law is "confiscatory." Of course when upon a hearing properly had after due notice to both sides, and a proper investigation of the facts, state legislation is found to be really confiscatory, it must be set aside by permanent injunction as conflicting with the Constitution of the United States. But that is not the question here. The question is whether the temporary restraining order issued *ex parte* upon mere affidavits and so-called ascertainment of fact by a master in chancery, very little acquainted with the subject matter and very little able to judge of it, should prevail, to annul a state statute.

Let us notice a tendency to usurp federal power under the treaty clause. Calhoun says that treaties are the supreme law of the land "provided such regulations (in treaties) are not inconsistent with the constitution." I quote Calhoun because he went further than almost anybody in maintaining the plenary power of the federal government to regulate our intercourse with foreign powers. If the treaty attempt to treat concerning some subject

matter, the regulation of which is not delegated to any branch whatsoever of the federal government, then that treaty is "inconsistent with the constitution," as being inconsistent with the purpose for which the federal government was formed. If it attempt to treat of some subject matter the regulation of which is delegated to any branch, I care not which one, of the federal government, I admit the plenary power of the federal government. That the treaty can give an alien equal rights with the citizen, even within a state concerning a subject matter that the federal government would otherwise not control, I do not doubt; but that it can give him superior privileges to a citizen I deny. If by treaty with Japan, for example, California can be forced to admit Japanese, or by treaty with China it can be forced to admit Chinese, to the same schools with white children, then by treaty with Haiti or Santo Domingo negroes from those islands could be admitted to the same schools with white children in Mississippi, let us say, where native-born negroes, citizens of the United States, cannot attend white schools.

The President in a Massachusetts speech is quoted as saying: "States rights ought to be preserved when they mean the people's rights, but not when they mean the people's wrongs." In God's name who is to say what are people's rights and what are people's wrongs? If I undertook to answer the quesion I should say *the people themselves.* And then if I were asked further—how they were to say it or have said it, how they were to draw the line or have drawn it, how they were to prescribe the people's rights and proscribe the people's wrongs—I would say through the fundamental organic law,—the Constitution of the United States, and in the constitution of the several states, which are *the prescribing voice of the people themselves.* "Thus far and thus far only shall any governmental authority over man ever go."

We are running mad. The latest proposition is to have a law for federal registration of automobiles, on the ground that automobiles do sometimes travel over state lines! It is proposed by the President to charter, and by Mr. Bryan to license, corporations chartered by the states, to enter into interstate business. The President's latest astounding proposition is to leave a branch of the executive government to distinguish between good trusts and bad trusts, mark out one for a license to do business and another for extirpation while maintaining the substantive part of the present

anti-trust law. What a campaign contribution breeder that would be! How the combinations and trusts—the present substantive law being cunningly retained—would run over one another in contributing to the campaign funds of whichever party was in power in order to bias the executive department of that party in finding them good and not bad!

I have referred once before to administrative usurpations of federal power as the most dangerous because most insidious and least seen by the average citizen. I wish that some of you, who have time to do it, would study the case of Ju Toy, a Chinaman, reported in 198 U. S. This man was born in the United States, went to China on a visit and came back; was sentenced to deportation as an alien by the immigration commissioner, whose sentence was affirmed by the Secretary of the Treasury. In some way the poor devil managed to communicate with a lawyer and to avail himself of habeas corpus proceedings. The referee found Toy's statement that he was born in America to be true. The case finally got to the Supreme Court. That court decided that the question of fact as to whether he was or was not a native-born citizen of the United States had been decided by an administrative tribunal authorized to try it, and that that finding was final and conclusive. In other words, that it made no difference whether, as a matter of fact, Toy was a natural-born citizen or an alien, he was banished, and that was all there was to it!

It is not alone in connection with this case that the courts have held that they could not question the conclusions reached by executive and administrative tribunals, and that no appeal to any court would lie, but in other matters as well. The power reposed in the Post Office Department, although it has not as yet been as seriously abused as it may be, is a power out of which the destruction of the entire principle of the freedom of the press may flow. The department may to-morrow, if it choose, cut off the "New York Times," or the "North American Review," or "Collier's Weekly," from the right to be transmitted through the mails under a fraud order. If it chose there would be no appeal to any court. It could, furthermore, if it chose, refuse by a fraud order to permit any mail to be delivered to either of them, or to me, or to you. It could do this upon the report of detectives in the department, and perhaps the first we would hear of it would be missing our mail.

And may be upon complaint and inquiry by us as to the exact point in which we had offended the department might furthermore return the answer that it was "not practicable to make a reply" to our inquiry. Franklin Pierce, at any rate, quotes a case in the book to which I have referred, where certain printed matter was excluded from the mail on the ground of "obscenity." The department was asked to specify in what respect and how and where there was anything obscene in the printed matter, and it is quoted to have replied that it was "not practicable" to answer the inquiry. It is not to the purpose to reply that the department would not do what I have supposed. That it *might* is a sufficient danger to human liberty.

In the case of South Carolina against the United States,[3] the Supreme Court says of our constitution—which, I repeat, is the only sovereign in America, except the people themselves acting in a prescribed way while exercising the power to amend and change it—the Supreme Court says of that constitution that it "speaks not only in the same way, but with the same meaning and intent with which it spoke when it came from the hands of its framers and was voted on and adopted by the people." That phrase ought to be memorized by every schoolboy who is studying "civil government" in a public school. Whatever the British constitution may be,—unwritten, not exactly definable—the American constitution is an instrument of written, prescribed, fixed sentences, phrases and words, that do not dance about kaleidoscopically upon the printed page and bear different meanings to-day and to-morrow, but mean just what they meant when they were uttered, although to-day, of course, they may be applied to very many conditions and instrumentalities that did not exist then. "Whenever an end aimed at is constitutional, then all proper means to that end are also constitutional." The great federal judge himself, John Marshall, uttered these words. The converse to that is not true, to wit, that whenever a certain means is constitutional, therefore the end aimed at is constitutional. Congress has a right, for example, to regulate interstate commerce, but if the end aimed at be not in verity the regulation of interstate commerce, but be the regulation of child labor, or manufacturing, or education within a state, and the interstate commerce clause of the constitution be

[3] 199 U. S.

resorted to merely as a means to the accomplishment of this latter end,—an end which in itself is unconstitutional,—then the thing sought to be done is exactly the opposite of that which John Marshall said could be constitutionally done.

One of the things most precious in our dual system of government is that the very fact of there being so many state governments in so many different climates, with so many different sorts of populations, so many different systems of agriculture, such diversity of pursuits and occupation, heredity and environment, enables our laws through the instrumentalities of the state legislatures to be adapted to the needs of the communities. Thus the states become great experimental fields. South Carolina can experiment with the dispensary law. If damage ensue it is limited to South Carolina. The people of the balance of the states can watch it without harm and learn lessons, find out if it is to be imitated or avoided. If Oklahoma wants to make an experiment of governmental guarantee of bank deposits, the balance of the union can watch the experiment with interest and with profit, without loss, no matter how it turns out. If Oregon wishes to try the experiment of initiative and referendum the same observation is applicable. All of us can watch the experiment of woman's suffrage in Colorado and some day imitate it or else learn to avoid it. And so with infinite diversity of surroundings and influence, with emulation existing between localities, the federal government does not need to experiment. In other lands experiments, if harmful, are national hurts.

The very maxim, *"E pluribus unum,"* is a Federal maxim. We must preserve not only the "one," but we must preserve with equal care and jealousy the integrity of the "many" governments which constitute our system—an "indestructible union of indestructible states"—"a republic of lesser republics."

May God grant that Jefferson prove right and Macaulay prove wrong and that this constitutional, democratic-federal republic of ours prove not a failure, as it assuredly must, if individual self-government—based on the "self-denying ordinance of a majority" denying absolutism to itself even,—and if local self-government, or home rule,—based on the reserved rights of the states,—be lost sight of by us or our children.